IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 401 of 1992

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT
and
Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

CHAUHAN JALAMSINH CHELSINH

Versus

STATE OF GUJARAT

Appearance:
MR MC BAROT for Petitioner
MR KT DAVE, APP, for Respondent No. 1

CORAM : MISS JUSTICE R.M.DOSHIT
and
MR.JUSTICE A.L.DAVE

Date of decision: 14/11/2000

ORAL JUDGEMENT

(Per : MR.JUSTICE A.L.DAVE)

1. The present appeal arises out of a judgment and order passed by the learned Additional Sessions Judge, Banaskantha, at Palanpur, in Sessions Case No.79 of 1991, convicting the appellant-accused for an offence of murder punishable under Section 302 of Indian Penal Code.

2. The facts leading to the present appeal, as emerging from the prosecution case, can be narrated thus:

2.1 The accused-appellant-Jalamsing C. Chauhan is resident of village Chekhla, taluka Palanpur and stays with his family. The complainant-Magansing Hatising Chauhan also stays there. The complaint and the accused are relatives and, according to the prosecution, about a week prior to the incident in question, they had a quarrel over water supply. Since then, the accused was expressing his determination to do away the complainant or any of his family members.

2.2 On 6.4.1991, at about 17.30 hours, the complainant was in his field when his younger son-Bhursing came to the field running and informed him that Jhalamsing Chelsing Chauhan had murdered Shantuba, wife of Bachusing. Bachusing is son of Magansing and brother of Bhursing. The complainant was further informed by Bhursing that Jalamsing ran after Shantuba with a Dharia and she, therefore, raised shouts for rescue. Hearing the shouts, Chandusing Galsing and Motising Magansing rushed to the spot, but they were intimidated by Jalamsing by saying that if they came closer, they would also be done to death with Dharia. Bhursing informed that Jalamsing had given Dharia blows to Shantuba on her neck and hand, to which she had succumbed. The complainant-Magansing, therefore, rushed to the spot and found Shantuba lying dead. He, therefore, went to Amirgadh Police Station and lodged the F.I.R. On basis of this F.I.R., an offence was registered and investigation was started. The Investigating Officer came to the place of the incident, got the Panchnamas drawn - one for the place of the incident and the other inquest Panchnama, arranged for the dead body being taken for postmortem and then started further investigation. Statements of various witnesses were recorded. It was found that there was sufficient evidence to connect the accused with the crime and, therefore, a report under Section 173 of the Code of Criminal Procedure was filed before the learned Chief Judicial Magistrate, Palanpur. Because the case was triable exclusively by a Court of Sessions, the learned Chief Judicial Magistrate committed the case to the Court of Sessions. The case came to be registered as Sessions

Case No.79 of 1991. The charge against the accused was framed at Ex.3 for offence of murder and criminal intimidation punishable under Section 302 of 506 of Indian Penal Code, respectively. The accused pleaded not guilty to the offences. The matter was, therefore, proceeded further.

2.3 After considering evidence led by the prosecution, learned Additional Sessions Judge came to a conclusion that the prosecution had successfully proved the charges against the accused and he, therefore, convicted the accused for both the charges. After hearing the accused on question of sentence, learned Additional Sessions Judge ordered the accused to suffer imprisonment for life for the offence of murder. No separate punishment was imposed for the offence of criminal intimidation. The accused is aggrieved by the said judgment and order and has, therefore, preferred this appeal.

3. We have heard learned advocate Mr. M.C. Barot for the appellant and learned Additional Public Prosecutor Mr. Dave for the respondent-State.

4. Learned advocate Mr. Barot has taken us through the entire record and proceedings. He submitted that the prosecution case is accepted by the learned Trial Judge on account of depositions of Motising Magansing and Bhursing Magansing. Witness-Chandusing Galsing, though shown as an eye-witness, has not supported the prosecution case. Mr. Barot submitted that these two so called eye-witnesses are relative and interested witnesses and, therefore, their depositions may be placed under close scrutiny.

4.1 Mr. Barot has drawn our attention to the depositions of Motising Magansing, the Investigating Officer-Mr. Yagnik, the complainant-Magansing and Chandusing to show that there are material contradictions. He submitted that, according to the complainant, Motising was questioned by the Investigating Officer immediately after recording the statement whereas Motising denies this fact. He submitted further that statement of Motising is recorded on the next day. This belated recording of statement of an eye-witness may be critically viewed. He submitted that when police inquired of Motising, it was found that he was not available in village and there is evidence to show that Motising and Bachusing were required to be summoned from Dantiwada by sending a jeep car and, therefore, his claim of being an eye-witness to the incident is not correct.

Mr. Barot submitted that this will leave only one witness, who can be said to have supported the prosecution case and that witness is Bhursing.

4.2 Commenting upon testimony of Bhursing, Mr. Barot submitted that he is a child witness. His statement is also recorded on the next day. He admits to be present when the Investigating Officer had come to their house. Still, he does not disclose that he had seen the incident and somehow his statement is recorded late by the police. This late recording of statements of material witnesses by the Investigating Officer may be seriously viewed. Mr. Barot submitted that the motive attributed by the prosecution for commission of the murder to the accused cannot be considered sufficient. Murders are not committed for such petty quarrels and, therefore, it would not be proper to rely on deposition of Bhursing.

4.3 Mr. Barot submitted that Bhursing is a young boy. Admittedly, there are two hedges between the place wherefrom Bhursing claims to have seen the incident and the place of incident. The cactus hedges are dense and tall ordinarily and the witness, therefore, could not have seen the incident.

4.4 Mr. Barot submitted that, keeping all these factors in mind, reliance ought not to have been placed on deposition of Bhursing and the accused-appellant ought not to have been convicted. He submitted that it is dangerous to convict a man on deposition of a child witness not corroborated by other material evidence. He, therefore, prayed that the appeal may be allowed and the judgment and order may be quashed and set aside and the accused may be acquitted of the charges.

5. Mr. Dave, learned Additional Public Prosecutor, has opposed this appeal. He submitted that, if depositions of witnesses are seen, it is clear that the Investigating Officer inquired of Motising after completing other formalities and, at that point of time, Motising was not available in the village. This would not mean that Motising was not in the village when the incident occurred. Further, he is indicated to be an eye-witness in the F.I.R. itself and, therefore, there is no question of fabricating an eye-witness.

5.1 Mr. Dave submitted that the late recording of statements of eye-witnesses by the Investigating Officer ipso facto do not weaken the prosecution case. In the instant case, the F.I.R. itself indicates that the incident was witnessed by Motising and Bhursing. The

details of incident are also given in the F.I.R. These two witnesses do not go contrary to the version which is given in the F.I.R. nor do they make any addition or alternation in the story given in the F.I.R. and, therefore, late recording of statements of these witnesses does not run the risk of any fabrication or improvement in the prosecution story.

5.2 Mr. Dave submitted that medical evidence corroborates the version given by the eye-witnesses. Further, the weapon used in the offence is discovered by the accused in presence of Panch witnesses. All these factors taken together connect the accused with the offence, as has rightly been held by the learned Trial Judge. The appeal may, therefore, be dismissed.

6. Mr. Barot, in reply to the arguments advanced by Mr. Dave, submitted that discovery of the weapon is not clearly established as required under Section 27 of the Evidence Act and, therefore, that factor may not be considered against the accused-appellant.

7. We have carefully considered the contentions raised by both the sides. We have been taken through the testimonial collection and other documentary evidence on record by the learned advocates threadbare.

8. If the F.I.R. (Ex.14) is perused, it can be seen that the complainant was in his field when Bhursing reached there running and informed him that Jalamsing Chelsing Chauhan (accused-appellant) had murdered Shantuba with a Dharia. He then narrates as to how the incident occurred. The complainant was informed by Bhursing that Jalamsing ran after the deceased with a Dharia. She, therefore, raised shouts for rescue. Hearing those shouts, Chandusing Galsing and Motising rushed to the spot, who were intimidated by Jalamsing. He further states that Jalamsing had given Dharia blows on neck and hand of the deceased, as a result of which she expired. The place of incident is also precisely indicated. The complainant also narrates the whole narration. If the tenor of the F.I.R. is seen, it makes it amply clear that witness-Bhursing has given a complete and detailed picture of the event that he had witnessed. The F.I.R. is lodged within an hour and a half of the incident. After the incident had occurred, Bhursing informed Magansing. Magansing went to the place of incident, saw what had happened and, thereafter, when to Amirgadh Police Station. All these things have occurred within a span of an hour and a half. This would hardly leave any scope for rustic villagers to think out and

concoct a story to falsely implicate the accused. The late recording of the statements of eye-witnesses which fall in line with the version emerging from the F.I.R., therefore, would not affect the prosecution case. There is no reason to suspect any foul play in late recording of the statements of these two witnesses.

9. So far as witness-Motising is concerned, he has supported the prosecution case in toto. His thorough cross-examination also has not helped the defence. It is true that Magansing in his deposition states that Motising had accompanied him to the Police Station for lodging the F.I.R. He states that Motising was sitting outside when the F.I.R. was lodged. But, in further cross-examination, he states that after the F.I.R. was recorded, Motising was called by the P.S.I. and interrogated. This fact is not supported either by Motising or by the Investigating Officer. On this count, Mr. Barot vehemently submitted that the prosecution case is self-contradictory. We are afraid, we cannot accept the submission of Mr. Barot for the simple reason that this version given by complainant-Magansing has no bearing on the incident or on the factum of Motising being an eye-witness. It is to be accepted that rustic villagers, in the existing system, some times out of fear of being disbelieved and to put emphasis to the fact that they are truly the eye-witnesses, tend to exaggerate or to add some embroidery to the facts out of their imagination and this frill or embroidery has to be ignored by the Court while evaluating the evidence unless it is of such a nature that it destroys the confidence in witness (A.I.R 1988 SC 1998).

10. Non-availability of Motising when summoned by the Investigating Officer is another factor which has been vehemently canvassed by Mr. Barot for not believing deposition of Motising. If deposition of P.S.I. Yagnik (Ex.36) is seen, he states that he reached the place of incident, prepared inquest Panchnama, Panchnama of the place of incident, dispatched the dead body for postmortem. He inquired about eye-witnesses only thereafter. If the Panchnama of place of incident is seen, it was drawn on 7.4.1991 between 7.30 and 8.00 hours. Thus, in fact, the Investigating Officer made inquiries about the eye-witnesses on the next day and, therefore, it cannot be said that the witness-Motising was not in the village on the day of the incident. As we have already stated earlier, deposition of witness-Motising is in full consonance with the version emerging from the F.I.R. and, therefore also, it does not leave any scope for suspecting any foul play. Late

recording of statement of eye-witness by itself does not amount to a serious infirmity, unless there are concommitant circumstances to suggest that it was done deliberately (A.I.R. 1979 SC 135).

11. As regards Bhursing being a child witness, it may be noted that the learned Additional Sessions Judge satisfied himself about the capacity of the witness by putting certain questions to the witness and, after being satisfied about the fact that the witness understands the seriousness of his deposition and the seriousness of oath, oath was administered on the witness. When the deposition was recorded, witness was aged 13 years. He, therefore, cannot be considered as too young to be swayed away or not to understand the implication of his deposition. We find his deposition to be quite lucid and natural narration of facts and deserves acceptance. This witness clearly states that he had seen the incident. If his deposition is read besides the deposition of Circle Inspoector-S.K. Patel (Ex.11) and is read with map (Ex.12), we do not find any substance in the argument advanced on behalf of the appellant that the witness could not have seen the incident. A suggestion was put to the witness that the hedge is 5 feet tall, which he has denied. Further, it comes in deposition of this witness that he was on a parapet. This would elevate his position from the ground level. There is evidence to show that the hedge was not so dense as would obstruct vision. The way in which the incident is indicated to have occurred,i.e. the accused had run after the deceased with a Dharia, is such that even if there is some obstruction due to density, by movement of the accused and the deceased, that obstruction would not be there as there is evidence to show that there were gaps in the hedge. We are, therefore, not convinced with the argument advanced by learned advocate for the appellant.

12. So far as the question of motive is concerned, in a case like the present one, it hardly retains any importance when there is ample reliable evidence of eye-witnesses connecting the accused with the offence. Presence or absence of motive would hardly matter. Still, in our opinion, the motive attributed by the prosecution, i.e. quarrel regarding water and enmity developing therefrom is not per se unbelievable.

13. In view of the foregoing discussion, none of the contentions raised on behalf of the appellant can be accepted. We have gone through the judgment and order impugned in this appeal. We are in agreement with the

reasonings adopted and conclusions arrived at by the learned Trial Judge and we do not find any merit in the appeal. We, therefore, dismiss the appeal.

[MISS R.M. DOSHIT, J.]

[A.L. DAVE, J.]

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